71-1357

Supreme Court, U. S.
FILED
APR 24 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No.

WALTER R. REYNOLDS, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The petitioner, Walter R. Reynolds, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, affirming his conviction in the United States District Court for the District of Columbia.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix, App. 1-44, to this petition. The three opinions of the District Court appear at App. 45-66, App. 66-71, and App. 72-80.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on December 20, 1971. A timely petition for rehearing was denied on February 22, 1972. By an order dated March 4, 1972, Mr. Chief Justice Burger extended the time for filing this petition to and including April 22, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Fourth Amendment forbids the introduction in evidence of records secured by an IRS agent pursuant to a search permitted upon his representation that he was to conduct a tax audit, when the agent failed to disclose that he was looking for evidence of criminality.

2. Whether the Fifth Amendment, which provides for indictment by a grand jury, requires dismissal of an indictment when not a single grand juror has read or listened to a reading of the complete indictment.

3. Whether petitioner was denied his right of cross-examination by the trial court's ruling that he could not cross-examine the two bank officers, who were the principal witnesses against him, on whether the bank had actually relied on the specific documents which, according to the indictment, were fraudulently submitted to obtain loans.

CONSTITUTIONAL PROVISIONS INVOLVED

Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, sup-

ported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

On September 22, 1967, petitioner Walter R. Reynolds, together with Bertram G. Dienelt, Jr., Harlan E. Freeman, R. Marbury Stamp, A. Claiborne Leigh and E. Neil Rogers, was indicted on thirteen counts set forth in a twenty-one page bill. Count One charged that, in violation of 18 U.S.C. § 371, the de-

fendants conspired to violated D.C. Code § 22-1301 (false pretenses) and § 22-1401 (forgery) in connection with the refinancing of loans on seventeen parcels of real estate. Counts Two through thirteen charged all defendants, except Dienelt, with substantive violations of D. C. Code § 22-1301, each count reciting the refinancing of a loan on one of the first twelve parcels described in Count One. On May 20, 1969, a jury acquitted Dienelt but convicted the other defendants, including petitioner, on each of the thirteen counts. On January 27, 1970, the United States District Court (Robinson, J.) sentenced petitioner to a term of twenty months to five years on Count One, ordering him to spend six months in jail and suspending the balance of the sentence. On Counts Two through Thirteen the District Court suspended imposition of sentence.

A. Statement of Facts Relevant to Question One

Prior to 1963, the Organized Crime and Racketeering Section of the Criminal Division, Department of Justice, and the Internal Revenue Service formed a special project, known as "The Metro Project", to investigate alleged corruption among public officials of Fairfax County, Virginia. (App. 45)[1] The project received legal guidance from the Department of Justice but was directed by Oral Cole, an IRS special agent. (App. 45) The project's staff consisted of IRS revenue and special agents, including revenue agents Hansel and Evangelist and special agent McElroy. (App. 45-46)

A principal target of the Metro Project was defendant A. Claiborne Leigh, who had served as Chairman

[1] The reference, App., refers to the appendix accompanying this petition.

of the Fairfax County Board of Supervisors. (App. 45) It was suspected by IRS officials that he had taken bribes. (App. 45) In June of 1963, revenue agent Hansel commenced an examination of Leigh's income tax returns for the early 1960's. (App. 45-46) Hansel obtained Leigh's permission to inspect records maintained at his law office. (App. 45-46; T.S.H.[2] 213, 220) In January of 1964, special agent McElroy accompanied Hansel to Leigh's office; for the first time Leigh was informed, by McElroy, that he was under criminal investigation. (App. 46; T.S.H. 195) McElroy told him he was being investigated for criminal income tax evasion, and advised him of his constitutional rights. The agents did not mention a possible bribery prosecution. (T.S.H. 195-96) In early March of 1964 Hansel and McElroy microfilmed Leigh's settlement files on property transactions involving his client the Reynolds Construction Company [hereinafter RCC], a closely held corporation.[3] (T.S.H. 175) The agents thereby learned that RCC had made use of straws in real estate transactions. (T.S.H. 176-77 According to the trial court, "[t]hese settlement files were scrutinized in detail by the 'Metro Project' investigators." (App. 46)

As the trial court found, "to ascertain the details of financial tranactions between Leigh and Reynolds pertaining to certain properties and sales contracts," (App. 46-47) revenue agent Evangelist was instructed by special agent Cole to audit the corporate returns of RCC and the personal returns of Reynolds and his

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[2] The reference, T.S.H., refers to the transcript of the June 4-5, 1968, suppression hearing.

[3] Reynolds and his wife owned a fifty percent interest in RCC; one Albert Shaw also owned a fifty percent interest. (JA 109).

wife. (App. 47; JA[4] 38) Special agent McElroy told Evangelist that Reynolds had business dealings with Leigh (JA 41): according to Evangelist, "there was an indication that a bribe may have been made." (JA 41) Evangelist understood that his assignment was "to look into possible payoffs to Mr. Leigh." (JA 47)

Pursuant to his assignment, Evangelist went to RCC's offices in the middle of March 1964. (App. 47) Except for income tax returns, Evangelist had no other records of Reynolds or RCC before commencing his investigation. (JA 40) He informed George Steele, an officer of RCC, that he was engaged in a tax audit, and obtained permission to inspect all corporate records. (App. 47; JA 28, 33-34) Evangelist borrowed and copied settlement sheets and sales contracts.[5] (JA 43) *In this case, as the Court of Appeals recognizes in its opinion* (App. 31 & 34), *agent Evangelist was clearly looking for evidence of criminal behavior from the inception of his investigation into petitioner's records.*

In evaluating petitioner's Fourth Amendment claim, the Court of Appeals focused on the initial meetings of Agent Evangelist and George Steele. The court (App. 33-35) asserts "[t]hat as a man of considerable experience in the world of finance Steele was aware of the

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[4] The reference "JA" refers to the joint appendix filed with the Court of Appeals.

[5] The evidence obtained by Agent Evangelist, if inadmissible, tainted the judgment of conviction (see opinion of the Court of Appeals at App. 34; government's brief in the Court of Appeals, pp. 7-8). At oral argument in the Court of Appeals the government conceded that petitioner had standing to complain of the search. The Court of Appeals adjudicated petitioner's Fourth Amendment claim on its merits.

potential criminal aspects of the civil audit." (App. 34) If the court is suggesting that Steele and through him petitioner then *knew* that agent Evangelist was looking for evidence of crime, there is no finding of fact in support of this implication, and there is nothing in Steele's testimony (T.S.H. 4-32) which would support such a finding.[6] There is no evidence in the record that petitioner (or Steele) knowingly waived any right petitioner might have under the Fourth Amendment.

B. Statement of Facts Relevant to Question Two

At a pretrial hearing on April 28, 1969, on Reynolds' motion to dismiss the indictment, Evan L. Swain, foreman of the grand jury, testified that he had not read the indictment before he signed it. (JA 68) He was unable to testify that the other grand jurors read it. (JA 67) As he recalled the events of September 22, 1967, the final day of the grand jury's deliberations on this case, the prosecutor, Edward Molenof, summarized the evidence (JA 66-67) and read from "the first part"

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[6] In seeking a rehearing in the Court of Appeals, petitioner argued that the Court of Appeals improperly intruded into the fact-finding function of the District Court and, to reinforce his point, sought leave to file with the Court of Appeals an affidavit signed by Steele (App. 90-91) in order to show that a court empowered to find facts could certainly find that Steele had no reason to believe and did not believe that Agent Evangelist was looking for evidence of crime. In his petition for rehearing, petitioner argued that as the Court of Appeals' rejection of his Fourth Amendment claim rested on a factual finding not made by the District Court (Steele's asserted knowledge concerning Agent Evangelist's real intentions), the Court of Appeals should vacate its opinion and judgment and remand to the District Court for a factual determination of Steele's knowledge at the time of the initial meetings between him and Agent Evangelist.

of the proposed indictment. (JA 67-68)[7] When Molenof went out of the grand jury room, he left the proposed indictment in a closed manila folder. (JA 66, 69) Molenof did not instruct the grand jury to read the proposed indictment. (JA 67) During its deliberations the indictment remained in the folder. (JA 67, 69)

Molenof did not testify but represented that he read Counts One and Two and "practically read" the remaining eleven counts to the grand jury. (JA 62) Later in the hearing Molenof conceded in response to the court's inquiry that he had not read the indictment in its entirety to the grand jury. (JA 69-70) When petitioner's trial counsel learned of the foregoing, he moved to dismiss the indictment. Following a hearing on the merits, the District Court rejected the motion as untimely. *United States* v. *Reynolds,* 300 F. Supp. 503 (D.D.C. 1969) (App. 66-71). In its opinion that court eschewed comment on the substantive issues raised by the motion and made no findings of fact pertaining to those issues.

The Court of Appeals, not regarding the motion as untimely, evaluated the testimony and rejected petitioner's contention on its merits. (App. 9-15) In so doing, however, that court misapprehended the testimonial record in two important respects.[8]

Firstly, the Court of Appeals writes that Swain "stated in open court that on the date the indictment

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[7] On this point Swain's sworn testimony is in full: "Well, it seems that he [Molenof] read the first part, but I can't remember how far down or how many counts that there were on it . . . ." (JA 67)

[8] Petitioner brought these errors to the attention of the court below in his petition for rehearing.

was returned the Government attorney read the first count to the grand jury in its entirety, as did he the second count, and that he then proceeded to summarize the remaining counts to the grand jury explaining that the language in each of these counts was the same as that in Count 2 and that the only difference in each of these counts was the date and the amount of the given loan in question." (App. 11) However, Swain's testimony totally lacks the detail ascribed to it in the opinion of the Court of Appeals. Foreman Swain testified that the prosecutor read "the first part"; he had little further recollection. (JA 67, 69) As prosecutor Molenof remarked during the hearing, Swain's recollection was "vague". (JA 65).

Secondly, at the hearing on Reynolds' motion the government contended that prosecutor Molenof had "thoroughly reviewed" the indictment with the grand jury. *Contrary* to the statement in the Court of Appeals' opinion (App. 12), however, Molenof did *not* testify in support of the government's contention.[9] While the Court of Appeals in its opinion (indented paragraph, App. 12) relies on the "testimony" of Burns, co-counsel for the government during the trial, Burns was not even involved in this case at the grand jury stage and therefore had no first-hand knowledge.[10]

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[9] After admitting that he had not read the complete indictment to the grand jury, Molenof claimed that he read Counts I and II, and that he further "advised" the grand jury of the remaining counts, explaining, according to him, "what each and every succeeding count pointing out the language" (JA 70) but he did *not* testify and was therefore not cross-examined on these assertions of his recollection of events which had transpired months before.

[10] In the language italicized by the Court of Appeals (indented paragraph, App. 12), moreover, Burns is misstating Foreman Swain's testimony, as a review of the transcript (JA 62-69) shows.

The testimonial record precludes the conclusion tha the grand jury or any member of it ever saw, read, or heard the complete indictment.

C. Statement of Facts Relevant to Question Three

Petitioner was president of a construction company which built homes in Northern Virginia. To obtain construction financing, RCC borrowed substantial sums from Eastern Savings & Loan. As these loans became due, they were refinanced with Eastern through the use of straw purchasers, many of whom were fictitious. As a result, the loan application and other documents contained false financial and other information.

At trial, the central factual issue was whether Eastern had relied on the false information, as charged in the indictment, or was aware of the straw nature of the transactions, as petitioner had allegedly been told by the broker (defendant Stamp) who arranged them. (JA 114) To prove reliance, the government called as witnesses two bank officials, but instead of asking them whether Eastern had in fact relied on the specific documents alleged to have been fraudulently submitted, the government only asked whether, as a general practice, their bank extended loans on the basis of false information. Their negative responses, the government contended, entitled the jury to infer that Eastern actually relied on the false information submitted in connection with the refinancings at issue.

To effectuate this strategy, the government persuaded the District Court to forbid cross-examination that sought to explore whether Eastern actually relied on the false information which the indictment asserted

that it had relied upon. The District Courts' opinion accurately portrayed the government's trial strategy:

> The theory of the Government's case was that Eastern followed a general practice of relying on representations made in loan applications, and that from this general practice of reliance, a jury might infer that Eastern relied on the seventeen applications which the defendants submitted.
>
> The Government was particular to restrict its direct examination of bank officials to the general practices which the bank followed after loan applications were received. The Government offered no evidence about the specific treatment of the seventeen applications in question. *When the defendants attempted on cross-examination to enter this area, the Government successfully objected on the grounds that direct examination had been limited to Eastern's general practices.* (Tr. 127-28 [JA 86-87]). Throughout the proceedings, the Government adhered to the position that, on the strength of evidence about the general practice of Eastern to require, accept and process loan application, a jury would be fully justified in inferring that the applications which the defendants submitted were in fact relied on by Eastern as the basis for making loans. (App. 76) (Italics added.)

In its opinion the Court of Appeals wrote that "if we were to find the trial judge in fact denied [appellants the right of cross-examination], we would be duty-bound to reverse the convictions."[11] But then on its own reading of the record the Court of Appeals found that petitioner's right of cross-examination had not been curtailed, and further found that the District Court was "mistaken" and "confused" (App. 24, fn. 13) in its own statement that it had restricted cross-examination pursuant to the government's objection.

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[11] App. 22.

In his petition for rehearing below, petitioner contended that the record supported the District Court's statement of its ruling,[12] and that the Court of Appeals mischaracterized the record.[13] In support of the rehearing petition, petitioner moved (App. 82 and 92) for leave to file affidavits of various defendants' trial counsel (App. 84-89 and 94-95) that they had understood the District Court to rule as that court said in its opinion it had ruled. In the event of doubt about what the District Court had in fact ruled, petitioner asked the Court of Appeals to remand the cause to the District Court for a determination by it on the accuracy of its own description (App. 76) of its trial rulings.

The Court of Appeals denied petitioner's motion for leave to file affidavits (App. 96) and declined to remand the case to the District Court.

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[12] The District Court first ruled during the cross-examination of the first bank official, Robert L. Stoy, at JA 86-87, and in explicit language ("I will not permit it") expressly reaffirmed its earlier ruling duirng the cross-examination of the second bank official, Thomas R. Harrison, at JA 100. We set out the transcript showing the District Court's reaffirmation of its ruling in the appendix to this petition, App. 98-99.

[13] In footnote 14, App. 26-27, of the Court of Appeals' opinion, the transcript is set out beginning at Tr. 545 (JA 98), but should have been set forth beginning at "(At the Bench)" on Tr. 544 (JA 98). When the entire dialogue (App. 98-99) is read, it is clear that the District Court would not allow defense counsel to show that the bank knew about and therefore did not rely upon the false loan information. Viewed in the entire context, the District Court's ruling at Tr. 547 (JA 100) is not "rather confusing," as asserted by the Court of Appeals. (App. 27). Because we dispute certain assertions of fact in the opinion of the Court of Appeals, we have caused the original record of the District Court and the pleadings in the Court below to be transmitted to this Court.

REASONS FOR GRANTING THE WRIT

As to Question One:

In this case, where it is acknowledged that Agent Evangelist from the outset of his investigation was looking for evidence which might implicate petitioner in a criminal act (App. 31 & 34), the opinion of the Court of Appeals excuses and condones his failure to disclose this purpose in obtaining petitioner's consent to rummage through his files. The opinion below is thus in conflict with this Court's decision in *Gouled* v. *United States,* 255 U.S. 298 (1921). As in *Gouled* (255 U.S. at 304), the government here proceeded without "warrant of any character"; as in *Gouled,* the government, bent on petitioner's criminal prosecution, seized his papers by means of a ruse. In *Gouled,* the government secretly purloined the papers; here, by not disclosing its purpose in full,[14] the government tricked petitioner into giving his consent. Agent Evangelist doubtless showed greater sophistication than his counterpart in *Gouled* but his intrusion upon the Fourth Amendment was no less invidious.

More recently, without being required to rule upon the issue here presented, this Court has acknowledged its recurring nature. In *United States* v. *Kordel,*

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[14] The notion advance in the opinion of the Court of Appeals (See App. 35) that Evangelist was genuinely interested in petitioner's civil tax liability is unsupported in the record. Agent Evangelist testified that he had no reason to suppose that there was any irregularity in the tax returns of RCC or of petitioner at the time he commenced his audit of their books and records. (JA 45) For the puposes of this petition, however, it is sufficient that the Court of Appeals has acknowledged that Agent Evangelist was looking for evidence of crime when he first approached petitioner's office but made no mention of this purpose.

397 U.S. 1 (1970), where the conduct of the Government was sustained, this Court pointedly noted:

> We do not deal here with a case where the Government has brought a civil action solely to obtain evidence for its criminal prosecution [23] or has failed to advise the defendant in its civil proceeding that it contemplates his criminal prosecution . . . .[24] *Kordel* at 11-12.

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[23] Cf. *United States* v. *Proctor & Gamble Co.*, 356 U.S. 677, 683-684; *United States* v. *Pennsalt Chemicals Corp.*, 260 F. Supp. 171; and see *United States* v. *Thayer*, 214 F. Supp. 929; *Beard* v. *New York Cent. R. Co.*, 20 F.R.D. 607.

[24] See *Smith* v. *Katzenbach*, 122 U.S.App.D.C. 113, 114-116, 351 F.2d 810, 811-813; *United States* v. *Lipshitz*, 132 F. Supp. 519, 523; *United States* v. *Guerrina*, 112 F. Supp. 126, 128.

Unlike *Kordel*, this case squarely presents the situation where the investigation from the beginning was motivated by a strong suspicion of criminal conduct, and the taxpayer was *not* apprised of this purpose when expressing his consent. In this context lower federal courts, in conflict with the decision below, have said that evidence so obtained should be suppressed. See, *e.g.*, *United States* v. *Wheeler*, 149 F. Supp. 445, 450 (W.D. Pa. 1957), reversed and remanded on procedural grounds, 256 F.2d 745 (3d. Cir. 1958); *United States* v. *Guerrina*, 112 F. Supp. 126, 128-130 (E.D. Pa. 1953), modified in a manner not here material, 126 F. Supp. 609 (E.D. Pa. 1955). The opinion below, in attempting to confront *Wheeler*, states that *Wheeler* has "the same factual pattern" (App. 31), acknowledges that the *Wheeler* court suppressed the evidence (App. 31), but after a few pages, in an abrupt about-face, states that it declines to "comment on the reasoning of the *Wheeler* court" because it is not "applicable to the case at bar." (App. 38). This treatment of *Wheeler* merely under-

scores the conflict between the court below and decisions, such as *Wheeler,* which sustain the individual against the machinations of his government.

In the court below, the government[15] relied upon cases in which the IRS had proceeded by an administrative summons under 26 U.S.C. § 7602 and the opinion below approvingly cites these cases. (App. 32). However, the "Metro Project" investigators declined to proceed by administrative summons. They were evidently unwilling to risk a judicial test of their civil tax need.[16] The government cannot here rightfully rely upon cases which sustain the IRS when it has abided by the statutory procedure provided by the Congress. The government is surely on far less secure ground when, as here, it has proceeded not by summons but by subterfuge.

It is nonetheless true, as the opinion below so well illustrates (App. 31-33), that the decisional process in a non-summons case like this one is directly influenced by the summons cases. Recently, this Court has agreed to consider whether the IRS is entitled to judicial enforcement of its summons when the IRS contemplates the taxpayer's criminal prosecution. *Couch* v. *United States,* No. 71-889, *cert. granted,* April 3, 1972. With *Couch* already before it, the complementary issue pre-

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[15] Governmenn's answering brief, p. 21, fn. 18.

[16] Indeed, had they so proceeded, it seems doubtful they would have made a showing of legitimate tax need because, as noted in footnote 14 *supra,* Agent Evangelist had no reason to suppose that petitioner had not paid his taxes when he commenced his audit. See, *e.g. Donaldson* v. *United States,* 400 U.S. 517 (1971), in which this Court reiterated that enforcement of a summons may be denied when a criminal charge has been preferred or when there is "an investigation solely for criminal purposes." 400 U.S. at 533.

sented in this petition—a taxpayer's Fourth Amendment rights when the IRS, contemplating his criminal prosecution, proceeds not by summons but by ruse—affords this Court an opportunity to provide comprehensive guidance upon the question of using civil tax inquiries for criminal law enforcement purposes.

As to Question Two:

Contrary to the assertion in the Court of Appeal's opinion, petitioner did *not* contend "that the reading of the indictment by the Government attorney and not by any member of the grand jury" was the "abuse" about which he complained. (App. 14) Rather, petitioner contended that the abuse lay in the fact that no member of the grand jury either read or listened to a reading of the proposed indictment in its entirety.[17] As a result, petitioner was not tried on an indictment which had been approved in each particular by a grand jury, in conflict with the constitutional principles of *Ex parte Bain,* 121 U.S. 1 (1887), *Stirone* v. *United States,* 361 U.S. 212 (1960), and *Russell* v. *United States,* 369 U.S. 749 (1962).

In *Gaither* v. *United States,* 134 U.S. App. D.C. 154, 413 F.2d 1061 (1969), where the court below reviewed the grand jury's function in great detail, it stressed that a critical part of a grand jury's role is to review the content of a proposed indictment. 134 U.S. App. D.C. at 164, 413 F.2d at 1071. A grand jury that purports to approve or ratify what it has not heard or seen fails in its duty to act as a check on prosecutorial discretion. Unless a grand jury actually reviews each charge in a proposed indictment, it simply is not in a

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[17] Reynolds' principal brief in the Court of Appeals, pp. 16-17.

position to approve or ratify the prosecution's handiwork.

Prior to *Gaither,* indictments returned in the District of Columbia were not read by or to the members of the grand jury. The grand jury would vote to indict for violation of a specified statute, but then only the foreman would read the indictment which the prosecutor framed. In *Gaither,* the court below condemned this procedure because, as it held, the actual terms of the indictment must be passed upon by the grand jury as a whole. *Ibid.*

In this case, unlike *Gaither,* not even the foreman read or listened to a reading of the indictment in its entirety, with the result that not a single member of the grand jury passed upon the entire bill. This practice presents a substantial issue under this Court's decisions in *Bain, Stirone,* and *Russell, supra.*

As to Question Three:

In order to affirm the judgment in this case, the Court of Appeals was required to read out of the record the restriction placed upon the cross-examination of defense counsel. To accomplish this, the Court of Appeals found that the District Court was "mistaken" and "confused" when it wrote in its post-trial opinion that it had restricted cross-examination. (App. 24, fn. 13)

In the court below, petitioner sought leave to file affidavits of trial counsel to show that they understood the District Court to have ruled as it wrote it had ruled. (App. 82 & 92) The purpose of these affidavits was not to prove the truth of what the District Court wrote but rather to show that, at the very least, whether de-

fense counsel were restricted about inquiring into Eastern's actual reliance was a genuine question of fact, and that the District Court, as finder of fact, was exclusively empowered to make this decision. Rule 52(a), FED. R. CIV. P.; see *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 340-41 (1949). The government neither opposed petitioner's motion seeking leave to file the affidavits nor submitted counter-affidavits by its own trial counsel.

Instead of considering and then resolving against petitioner such an issue of fact, the Court of Appeals should have ordered a remand. In finding that the District Court had not meant what the District Court's own written opinion said, the Court of Appeals "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this court's power of supervision." Rule 19(1)(b), RULES OF THE SUPREME COURT.

As a result of the District Court's rulings and the Court of Appeals' opinion, petitioner has yet to be afforded an opportunity to confront the principal witnesses on the central issue of this case—whether the bank in fact relied on the false loan documents submitted in connection with the transactions described in the indictment or whether its officers were aware of the true nature of those transactions. Petitioner has thus been effectively deprived of his Sixth Amendment right to confront his accusers.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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